UNITED
NATIONS

AT

Administrative Tribunal

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AT/DEC/589
23 June 1993

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 589

Case No. 645: SHOUSHA

Against: The United Nations Joint Staff Pension Board

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, President; Mr. Samar Sen, Vice-President; Mr. Mikuin Leliel Balanda;

Whereas at the request of Rafik M. Shousha, a recipient of an early retirement benefit from the United Nations Joint Staff Pension Fund, hereinafter referred to as the "Pension Fund", the President of the Tribunal, with the agreement of the Respondent, extended to 27 January 1992, the time-limit for the filing of an application to the Tribunal;

Whereas, on 13 January 1992, the Applicant filed an application requesting the Tribunal:

"...

3. To rescind the decision adopted by the Standing Committee, acting on behalf of the United Nations Joint Staff Pension Board (Pension Board), at its 172nd meeting, held in Paris on 25 July 1991, to uphold the decision by the Secretary of the Board to apply in respect of the Applicant, from 1 January 1991, the Pension Fund's Adjustment System, which, as amended by United Nations General Assembly resolution 45/242, of 21 December 1990, included a further interim measure that did not protect the Applicant; and to draw all the legal consequences therefrom;

4. Accordingly, to order the Fund to pay the Applicant, with retroactive effect from the date of his separation from service, a pension recalculated on the basis of the system in effect on 31 December 1990, unless it orders the Fund to take such other

pecuniary measures, which are left to the discretion of the Tribunal, in order to compensate the Applicant for his loss (more than 34 per cent) in the amount of his local currency pension;

5. To award the Applicant, as costs, a sum payable by the Respondent, assessed at the time of the filing of this application, at one hundred thousand (100,000) French Francs, subject to adjustment upon completion of the proceedings."

Whereas the Respondent filed his answer on 14 August 1992;

Whereas the Applicant filed written observations on 30 March 1993;

Whereas, on 14 May 1993, the President of the Tribunal ruled that no oral proceedings would be held in the case;

Whereas, on 21 May 1993, Mr. Erik Crone, the recipient of a pension from the Pension Fund, filed a request for intervention in the case and on 1 June 1993, the Respondent submitted his comments thereon. On 9 June 1993, the intervenor provided his comments on the Respondent's submission on the intervention;

Whereas, on 24 May 1993, at the Tribunal's request, the Respondent submitted his comments on the Applicant's written observations, and on 9 June 1993, the Applicant provided his comments thereon;

Whereas the facts in the case are as follows:

The Applicant, born on 23 January 1936, was a staff member of the World Health Organization (WHO), from 7 January 1963, until his separation from service on 31 January 1991, upon the agreed termination of his permanent appointment. He then became entitled to an early retirement benefit, under the Regulations of the Pension Fund, on 1 February 1991.

As the Applicant provided satisfactory proof of his residence in Switzerland after his separation from WHO, his early retirement benefit has, since its inception, been established and adjusted, under the applicable provisions of the "two-track Pension

Adjustment System", adopted by the General Assembly in its resolution 35/215, as subsequently amended.

Under these provisions, the rate of exchange to be used in converting the US dollar amount of the benefit payable to a resident in a country other than the United States of America, is the average of the rates in effect during the 36 consecutive months prior to the participant's separation from service.

Subsequently, in its resolution 42/222, dated 21 December 1987, the General Assembly adopted an "interim floor" measure as part of the Pension Adjustment System for the calculation of the local currency benefit, which applied to pensioners and others residing in certain countries, including Switzerland. This measure was designed to prevent a loss in the value of pension benefits in local currencies, where an overall decline in the 36 months average exchange rate referred to above, occurred during the years 1986 and 1987. It was to be in effect from 1 January 1988 to 31 December 1990. In essence, it established a "floor" for the local currency base amount of the benefits affected, so that they could be no less than the amount established by applying to the dollar base amount the average monthly ratio between the local currency base amount and the dollar base amount during 1987.

The measure applied to participants who separated from or died in service during 1988, 1989 or 1990 and to their survivors, except to deferred retirement benefits and benefits derived therefrom. It was intended to dissuade staff members from taking early retirements for the purpose of avoiding losses in their future local currency pension, arising from a further devaluation of the US dollar in relation to the local currency of the country of their residence.

As the Applicant separated from service after 31 December 1990, the interim floor measure did not apply to him.

With effect from 1 January 1991, i.e. after the expiration of the interim measure, the General Assembly, in its resolution 45/242, dated 21 December 1990, introduced a "transitional measure" under which participants aged 55 or over on 31 December 1990, who

separated between 1 January 1991 and 31 March 1992, would become entitled to an amount in local currency no smaller than that to which they would have become entitled had they separated on 31 December 1990, at the age and with the final average remuneration and contributory service they had on that date.

The Applicant acknowledged that the "transitional measure", which by its terms, was limited to those who reached age 55 on or before 31 December 1990, did not include him, as he reached age 55 only on 23 January 1991. However, in a letter dated 27 January 1991, to the Secretary of the Pension Fund, he expressed the hope that "cases like mine could be considered with a view to applying these measures retroactively" and that "the few cases that fall between two stools would not be forgotten."

In his reply of 4 April 1991, the Secretary of the Fund confirmed that the Applicant fell outside the scope of the "transitional measure" and that only the General Assembly, which had adopted the Pension Adjustment System, had the authority to modify its provisions.

In a letter dated 5 June 1991, the Applicant lodged an appeal with the Standing Committee of the Pension Board against the refusal by the Secretary of the Board "to apply the 'floor rate' as approved by the United Nations General Assembly in its resolution 42/222 dated 21 December 1987, to determine the local currency base amount of my pension."

The Standing Committee of the Board, at its 172nd meeting held on 25 July 1991, upheld the decision taken by the Secretary of the Board in the Applicant's case. In a letter dated 14 August 1991, the Secretary of the Board informed the Applicant of the Standing Committee's decision, as follows:

> "Please be advised that, at its above meeting, the Standing Committee considered whether the transitional measure set out in paragraph 37 of the UNJSPF Pension Adjustment System was implemented properly by the Secretary of the Board and then applied correctly in you case when the initial Swiss local-currency track amount of your early retirement

benefit was determined. The Standing Committee decided to uphold the decision taken by the Secretary of the Board in your case, on the grounds that the Secretary was constrained to apply the provisions of the UNJSPF Pension Adjustment System as adopted by the UN General Assembly, including its recent amendment through General Assembly resolution 45/242, under which you were not entitled to the transitional measure.

While agreeing that the Secretary of the Board had no option but to apply the decision of the General Assembly - which had been based on a recommendation of the Pension Board - as to the limited scope of application of the transitional measure, several representatives of participants on the Pension Board noted their reservations as to the legality of the Assembly's decision."

On 13 January 1992, the Applicant filed the application referred to earlier.

Whereas the Applicant's principal contention is that:

The Respondent's decision violated the Applicant's rights, in that it misconstrued the Pension Fund's obligation to avoid arbitrary modifications in its Pension Adjustment System.

Whereas the Respondent's principal contention is that:

The Applicant's rights were not violated by any arbitrary action modifying the Pension Fund's Adjustment System.

The Tribunal, having deliberated from 10 June to 23 June 1993, now pronounces the following judgement:

I. The Applicant challenges the validity of a decision dated 25 July 1991, by the Standing Committee, acting on behalf of the United Nations Joint Staff Pension Board (Board) of the UN Joint Staff Pension Fund ("Pension Fund"), to uphold a decision of the Board's Secretary to apply in respect of the Applicant from 1 January 1991, the Pension Adjustment System, as amended by UN General Assembly resolution 45/242, dated 21 December 1990. The

basis of the Applicant's contention is his claim that a transitional measure adopted by the General Assembly through its resolution 45/242 was arbitrary, inasmuch as it failed to include within its purview him and others who reached the age of 55 after 31 December 1990. In essence, the Applicant questions the validity of the General Assembly's action in limiting the transitional measure to staff members who had attained age 55 before 1 January 1991. He recognizes, however, that the Standing Committee applied, quite faithfully in accordance with its terms, the transitional measure established by General Assembly resolution 45/242.

II. That transitional measure was adopted about a year before a long-term modification of the Pension Adjustment System by the General Assembly in 1991. It was adopted in recognition of the impending expiration, on 31 December 1990, of an earlier interim measure, adopted by the General Assembly, which related to the years 1988, 1989 and 1990. The 1988-90 interim measure provided for a "floor ratio" as part of the Pension Adjustment System. Its purpose was to ameliorate, in part, the adverse effects on pension entitlements of staff members whose pensionable remuneration had been reduced and/or frozen and who were retiring in certain countries with a high cost-of-living, of the steady appreciation of the local currency in relation to the US dollar. These factors gave an incentive to staff members to take early retirement if they were planning to retire in those countries. The decline in the value of the dollar, together with reduced and/or frozen pensionable remuneration, meant that, under the pre-1988 Pension Adjustment System, staff members eligible for early retirement who remained in service until their normal retirement date would receive a lower pension in local currency than on early retirement.

III. The Tribunal notes that when the General Assembly established the 1988-90 "floor ratio", one of its purposes was to

lessen or remove this incentive for early retirement. The interim nature of the measure was made clear. The General Assembly also specifically provided that no acquired rights were being created by the measure and that the Pension Adjustment System was to be studied further to seek a longer term solution to the problems which the interim measure had intended to alleviate.

IV. Even before the 1988-90 interim measure, the problems of inflation and currency fluctuation in connection with the calculation of pension benefits had been considered by the General Assembly. Measures had been taken to lessen the fortuitous impact of relative currency values in the month preceding retirement, in calculating the local currency track pension figure under the two-track Pension Adjustment System. Indeed, although the amount of the Applicant's pension was not affected by the 1988-90 interim measure, he did receive the benefit of a pension adjustment feature dealing with that problem, in accordance with the so-called "Washington formula" adopted by the General Assembly in resolution 32/215, effective 1 January 1981.

V. At the time the General Assembly adopted the transitional measure in 1990, it had the benefit of substantial exploration and discussion of the subject by the Board which by consensus, had favoured the measure adopted by the General Assembly as against other options that were considered. Paragraph 114 of the Board's report to the General Assembly in 1990, which was cited in the resolution adopting the transitional measure, stated:

> "Noting that the interim floor measure would expire on 31 December 1990 as stipulated in General Assembly resolution 42/222, the Board, after extensive negotiations, agreed by consensus:

(a) that there was need for a transitional measure which would be applicable to a specific group of participants (...) for a limited period;

(b) That the measure should, in no case, be construed as constituting a precedent, nor give rise to an expectation of extension for a further period, whether or not agreement was reached on a longer-term modification of the Pension Adjustment System;

(c) That this measure should therefore not constitute an acquired right for participants who either retire or choose early retirement after the expiration date of the transitional measure;

(d) On this basis, to recommend to the General Assembly the establishment of personal 'floor' amounts for the initial local currency pensions of participants in the Professional and higher categories, corresponding to the initial local currency they would have received had they separated on 31 December 1990, on the understanding that such 'floor' amount would be applicable only to participants qualified for a retirement or early retirement benefit on 31 December 1990 who separate on or before 31 March 1992.

This measure, if approved by the General Assembly, would be incorporated into the Pension Adjustment System as described in annex V."

VI. The General Assembly was obviously aware that between 1988 and 1990, staff members eligible for early retirement, i.e., having reached the age of 55 before 31 December 1990, might, in reliance on the 1988-90 interim measure, have decided against taking early retirement. For such persons, the General Assembly decided, through the transitional measure, to provide a limited opportunity to take early retirement after 31 December 1990 and still benefit from the 1988-90 "floor ratio" interim measure. This transitional provision was to remain in effect for a 15-month period until 31 March 1992. It was contemplated that, thereafter, a long-term modification of the Pension Adjustment System would be introduced. Doubtless, cost considerations were also taken into account by the General Assembly in 1990, when it adopted the transitional measure.

VII. The Tribunal notes that the General Assembly saw no need to extend the benefit of the 1988-90 transitional measure to those who would become eligible for early retirement after 31 December 1990. As the Respondent has noted, one reason for this was that, between 1988 and 1990, pensionable remuneration had been unfrozen and had been increasing. Although, as the Applicant points out, this was true for all staff members, the fact remains that the level of pensionable remuneration was an element which entered into the adoption of the 1988-1990 transitional measure to deal with the problem of longer service resulting in a lower pension benefit. This element continued to have significance with regard to the phasing-out of the transitional measure. The Tribunal finds therefore, that it was not irrelevant, as claimed by the Applicant; it was germane to the General Assembly's willingness to retain the "Washington formula" pending a long-term modification of the adjustment system in respect of those not covered by the transitional measure.

VIII. If the General Assembly had extended the duration of the 1988-90 interim measure for a wider group of staff, it would have re-created the undesirable incentive, which might not otherwise have existed, for the early retirements of persons who first became eligible for early retirement after 31 December 1990. Staff members who first became eligible for early retirement between 1 January 1991 and 31 March 1992, might have found the 1988-90 interim measure sufficiently attractive to justify early retirement before 1 April 1992. However, one of the elements of the pre-1988 incentive to take early retirement in the light of the currency fluctuations in high cost-of-living countries had changed significantly, as noted in the preceding paragraph. Moreover, the basic problem was expected to be addressed by a long-term modification of the Pension Adjustment System. In the circumstances, the General Assembly, had a reasonable basis for assuming that persons becoming eligible for early retirement

between 1 January 1991 and 1 April 1992, who were dissatisfied with the pension adjustment system applicable to them under the "Washington formula" would have an incentive to remain in service until at least the effective date of the anticipated long-term modification.

IX. The Tribunal considers, therefore, that the scheme adopted by the General Assembly in 1990, can hardly be characterized as arbitrary. It was intended to lessen, if not eliminate the incentive for early retirement provided by the currency fluctuation problem, while at the same time protecting for a limited period, staff who, but for the 1988-90 interim measure, might have opted for early retirement before 1 January 1991. The transitional measure adopted by the General Assembly with respect to the period 1 January 1991 through 31 March 1992, which was limited to staff who had been eligible to avail themselves of the interim measure through early retirement before 1 January 1991, had, in the Tribunal's view, a wholly rational basis.

X. The Applicant, however, maintains that, because he reached the age of 55 on 23 January 1991, only 23 days after the expiration of the 1988-90 interim measure, the General Assembly acted arbitrarily in not continuing the 1988-90 interim measure for the benefit of persons like himself, who reached the age of 55 after 1 January 1991, but before 1 April 1992, and who wished to take early retirement. In effect, the Applicant would have the Tribunal treat him as though he had an acquired right to the benefit of the 1988-90 interim measure when he reached the age of 55, despite the explicit language of the General Assembly resolution that no acquired rights were created by it.

XI. The Tribunal recalls Judgement No. 514, Maneck (1991), para. IV, in which, in rejecting the application, it said :

> "... the Tribunal is not empowered to rewrite existing regulations or to create new regulations for the Pension Fund. That is the function of the General Assembly. To the extent that the Applicant seeks such relief from the Tribunal on grounds deemed by him to be equitable in nature, it is plain that his application must fail. The Tribunal likewise has no authority to extend to the Applicant an interim measure adopted by the General Assembly which simply does not apply to him. This again is a matter for the General Assembly's legislative authority."

The Tribunal notes that in Maneck, the Applicant also sought to have the Tribunal apply to him the "floor ratio" under the 1988-90 interim measure even though his circumstances did not come within its terms.

XII. The Tribunal also recalls its words in Judgement No. 546, Christy, et al. (1991), para. XIV, that:

> "It is within the province of the General Assembly, following advice of the International Civil Service Commission, the Board and others, to make reasoned judgements with regard to the Pension Adjustment System ... It is not for this Tribunal to attempt to evaluate the complex considerations involved in making determinations as to comparable income replacement ratios, or the effect on comparable pensions of changes in the United States tax laws, or similar matters. These are properly matters for the General Assembly's judgement. And it is surely not within the competence of this Tribunal to substitute its judgment for that of the General Assembly with respect to matters of that nature."

XIII. Finally, the Tribunal recalls its Judgment No. 524, Stein (1991), paras. VIII and IX, in which the Tribunal declined to find arbitrariness in the cut-off dates of a transitional pension calculation measure adopted by the General Assembly, as it found that a rational basis existed for the General Assembly's action. The Tribunal also noted that "... Any transitional arrangement invariably results in some who benefit and some who do not..."

XIV. The Tribunal has pointed out above that it sees an entirely rational basis for the transitional measure adopted by the General Assembly in 1990, in anticipation of its 1991 long-term modification of the Pension Adjustment System (which became effective on 1 April 1992). That the General Assembly was satisfied temporarily with continuation of the "Washington formula" and did not wish to encourage, or incur higher costs for, early retirements by staff members like the Applicant, who reached the age of 55 after 1 January 1991, cannot be considered unlawful by any criterion. It was open to the General Assembly to be far less concerned with the possibility of excessive early retirements after 1 January 1991, while at the same time, declining to encourage them. For all of the above reasons, the Tribunal sees no conflict whatever between the inapplicability of the 1990 transitional measure to the Applicant and the governing principles as to modifications in the Pension Adjustment System. (Cf. Judgement No. 546, Christy, et al. (1991), para. XIII; Judgement No. 378, Bohn, et al. (1986), para. XXXI; Judgement No. 379, Gilbert, et al. (1986), para. XXX.)

XV. The Tribunal notes that the Applicant decided, for entirely personal reasons, to take early retirement in 1991, despite the fact that he could have remained in service until 1 April 1992, or longer. His decision was apparently based in large part on his desire to maintain his residential status in Switzerland rather than jeopardize it by the possibility of transfer to another country, had he remained in service. It is not for the Tribunal to comment upon the merit of such a personal decision by a staff member. Any adverse consequences of such a personal decision cannot affect the validity of any reasonable action by the General Assembly. It is always up to the staff member to balance the advantages and disadvantages of a personal decision before making it. The Applicant was in a position to do so, and presumably he did.

XVI. For the foregoing reasons, the application is rejected, as is the request for costs.

XVII. An application for intervention, advancing the same contentions as those described above, has been submitted by Mr. Erik R. Crone, an FAO staff member who, like the Applicant, Mr. Shousha, reached the age of 55 after 1 January 1991, and took early retirement before 1 April 1992. The application for intervention is admitted and rejected for the reasons set forth above, as is the request for costs.

(Signatures)

Jerome ACKERMAN
President

Samar SEN
Vice-President

Mikuin Leliel BALANDA
Member

Geneva, 23 June 1993

R. Maria VICIEN-MILBURN
Executive Secretary

UNITED NATIONS

AT

Administrative Tribunal

Distr.
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AT/DEC/590
25 June 1993

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 590

Case No. 658: ABDALA, ET AL Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, President; Samar Sen, Vice-President; Mr. Mikuin Leliel Balanda;

Whereas at the request of Ali Abdala and eighty other staff members of the United Nations Economic and Social Commission for Western Asia, hereinafter referred to as ESCWA, the President of the Tribunal, with the agreement of the Respondent, successively extended to 10 January and 28 February 1992, the time-limit for the filing of an application to the Tribunal;

Whereas, on 27 February 1992, the Applicant filed an application containing pleas which, in part, requested the Tribunal to:

"1. Order the Respondent to:

(a) implement fully and without reservation the recommendation of the JAB [Joint Appeals Board] of 13 August 1991;

(b) re-instate the rental subsidy in full and pay the Applicants one hundred per cent of the 1989 subsidy with effect from 1 April 1990 (the date when the phasing-out process commenced), through 1991, or the date of expiration of their lease in Baghdad, less the amounts they have already received in rental subsidy during the phasing-out period;

(c) ensure that the Applicants, irrespective of their claim under 2(a) above, benefit from the compensation package offered to the internationally-recruited staff during the period of temporary repatriation or reassignment, including salary and all allowances applicable to Baghdad as their official duty station, and monthly evacuation allowance or an appropriate subsistence allowance for the staff members and eligible dependents, as enumerated in the Respondent's letter to the Applicants, dated 10 September 1991...;

(d) to ensure that the Applicants, irrespective of their claim under 2(a) above, benefit from the financial arrangements offered to all ESCWA internationally-recruited staff applicable to them, in connection with the temporary regrouping in Amman, Jordan as explained in the Respondent's letter to the Applicants dated 10 September 1991."

Whereas the Respondent filed his answer on 14 December 1992;

Whereas the Applicant filed written observations on 12 March 1992;

Whereas, on 7 June 1993, the Tribunal put questions to the Respondent, who on 9 and 14 June 1993, provided his answers thereon;

Whereas the facts in the case are as follows:

Ali Abdala entered the service of the United Nations on 7 July 1980, on a three month fixed-term appointment as a Personnel Clerk at the G-4, step I level, at the Economic and Social Commission for West Asia (ESCWA), with Headquarters at the time, in Beirut, Lebanon. He continued to serve on a succession of fixed-term appointments of varying duration until 29 April 1986, when he was granted a probationary appointment. On 1 January 1987, he was given a permanent appointment.

In 1981, the Secretariat of ESCWA relocated to Baghdad, Iraq. The Applicant and approximately 115 other General service staff members, who had been locally recruited for service in

Beirut, were transferred to Baghdad with the status of internationally recruited staff. International status was granted to General service staff because the Administration anticipated difficulties in recruiting a sufficient number of qualified General Service staff in Baghdad. Under staff rule 104.7(a), internationally recruited staff members are entitled to various allowances and benefits, for which locally recruited staff members are not eligible.

In July 1981, a working group was convened at United Nations Headquarters to deal with outstanding issues relating to the transfer of the ESCWA secretariat. Among the financial incentives recommended by the working group was the institution of a rental subsidy arrangement which would limit the rent payable by transferred General Service staff to a maximum of 20 per cent of their net remuneration.

At the time, the Government of Iraq had offered to rent to ESCWA two residential apartment buildings and to authorize ESCWA to sublet apartments in those buildings to the transferred General Service staff members. ESCWA rented the two apartment buildings from the Government under a Master Lease, signed on 20 March 1982.

On 11 August 1981, the Executive Secretary of ESCWA announced to the staff, in information circular ECWA/IC/48, Relocation of ECWA to Baghdad, the financial arrangements relating to the conditions of service of ESCWA staff in Baghdad. With regard to the ad hoc rental subsidy, the circular stated: "as an exceptional measure, an ad hoc rental subsidy has been granted to encourage the G.S.[General Service] staff to relocate with ECWA. Accordingly, the rent payable by staff members will be limited to a maximum of 20% of their net base salary plus NRA [Non-Resident Allowance]. The remaining rental cost will be fully covered by the Organization provided the staff member's rent does not exceed ID.2750 per annum, i.e. the highest rent payable in the Government-provided apartment buildings. This more generous provision for G.S. staff is justified in order to compensate for the lower level of their emolument compared to Professional staff."

In his Note A/CN.1/R.1123 dated 15 May 1990, to the Advisory Committee on Administrative and Budgetary Questions (ACABQ), the Secretary-General requested the Committee's concurrence to an arrangement under which the rental subsidy would be "phased out by 30 June 1991."

In making his proposal for phasing out the rental subsidy to internationally recruited General Service staff, the Secretary-General noted that the rental subsidy payments had been made to ESCWA staff for eight years despite the fact that the arrangement was only intended to continue until the housing situation was stabilized, through the provision by the host government, of permanent residential buildings. It had "become clear that, despite repeated efforts by the Secretariat, those buildings are not going to be provided." Although the subsidy was initially warranted by the circumstances, its continuation had created "serious morale problems on the part of the locally-recruited General Service staff at ESCWA, who see it as a departure from the principle of equal pay for equal work". The arrangement also departed from the common approach agreed at the inter-agency level for the treatment of internationally recruited General Service staff. Noting however, that a sudden discontinuance of the ad hoc rental subsidy would have a significant financial impact on the staff members who received it, the Secretary-General recommended that the rental subsidy be phased out over a period of eighteen months, ending in June 1991, during which the staff members affected could make the necessary adjustments.

The ACABQ approved this recommendation on 24 May 1990. In a cable dated 1 June 1990, the Acting Under-Secretary-General for Administration and Management informed the Executive Secretary of this decision. In implementing the phasing out of the rental subsidy, staff would be paid as follows:

100 per cent subsidy from 1 January 1990 to 31 March 1990,
75 per cent subsidy from 1 April 1990 to 30 June 1990,
50 per cent subsidy from 1 July 1990 to 30 September 1990,
25 per cent subsidy from 1 October 1990 to 30 June 1991.

On 30 July 1990, the Applicant and the other affected General Service staff members requested a review of the administrative decision to phase out the rental subsidy by 30 June 1991. In a reply dated 19 November 1990, the Assistant Secretary-General for Human Resources Management informed the Applicants that the decision would be maintained. On 19 November 1990, the Applicants lodged an appeal with the Joint Appeals Board (JAB). The JAB adopted its report on 13 August 1991. Its conclusions and recommendations read as follows:

> "Conclusions and Recommendations
>
> 21. The Panel concludes that the Secretary-General has the authority to discontinue the payment of the subsidy that was authorized on an ad hoc and exceptional basis.
>
> 22. On the other hand, bearing in mind the aforesaid conditions, the Panel is of the opinion that the Secretary-General's decision was untimely and detrimental to the interest of the Appellants.
>
> 23. Accordingly, the Panel recommends to the Secretary-General that, in view of the exceptional circumstances faced by the Appellants, the phased-out subsidy be reinstated in full through 1991, on the understanding that reimbursement to the staff will be contingent on the actual extension of their leases."

On 10 September 1991, the Acting Under-Secretary-General for Administration and Management informed the Applicants that the contested decision would be maintained, on the ground that the decision was "fully justified" by the reasons set forth in the note by the Secretary-General of 15 May 1990 to the ACABQ. In addition, he stated that:

> "The Secretary General wishes to note also that the temporary regrouping in Amman, Jordan, of all ESCWA internationally-recruited staff, both in the Professional and General Service category, has been approved for an initial period of one year as from 1 August 1991, with change of such staff members' official duty station from Baghdad to Amman. Accordingly, their emoluments will be determined on

the basis of their new official duty station, with the compensation package, which had been applicable to them while on temporary repatriation status, being discontinued. At the same time, as an exceptional measure in connection with the regrouping, rental expenses incurred by ESCWA internationally-recruited staff, both in the Professional and General Service categories, for accommodations retained in Baghdad will be reimbursed in full, subject to certain conditions, as from the time of their temporary regrouping in Amman and up to the end of September 1991 or the date of expiration of the lease, whichever comes first. You may, therefore, be eligible for reimbursement of rental expenses in Baghdad under the above-mentioned exceptional arrangement, depending upon circumstances which would require clarification.

In view of the aforesaid, the Secretary-General feels that it would not be justified to make an exception over and above that which has been approved in connection with the temporary regrouping in Amman.

..."

On 27 February 1992, the Applicants filed with the Tribunal the application referred to earlier.

Whereas the Applicants' principal contentions are:

1. The Respondent's decision to phase out the rental subsidy in Baghdad was untimely and detrimental to the Applicants' interests and welfare and constituted an improper exercise of his discretionary authority.

2. The Respondent was obliged by specific security and other circumstances to maintain the subsidy until the host Government fulfilled its legal commitment to provide permanent rent-controlled housing for all internationally-recruited General Service staff.

3. The compensation package offered to the Applicants during their initial temporary repatriation or reassignment from Baghdad, would not compensate them for the financial loss which they incurred as a result of the premature phasing out of their rental subsidy.

4. The benefits offered to all internationally-recruited staff, both in the Professional and General Service categories, with effect from 1 August 1991, in connection with their temporary regrouping in Amman, Jordan, would also not compensate the Applicants for the financial loss incurred as a result of the untimely phasing out of their rental subsidy in Baghdad.

Whereas the Respondent's principal contentions are:

1. The rental subsidy was instituted for the internationally-recruited General Service staff members as an exceptional ad hoc measure, which was never intended to become permanent. The Secretary-General had the authority and discretion to phase it out. His decision may be reviewed by the Tribunal only in the case of abuse of discretion.

2. The Applicants' pleas for benefits payable on relocation to Amman are not properly before this Tribunal.

The Tribunal, having deliberated from 7 June to 25 June 1993, now pronounces the following judgement:

I. The Applicant and 80 staff members of ESCWA, who claim to be similarly situated, challenge a decision of the Respondent, dated 10 September 1991, insofar as it did not adopt a JAB recommendation regarding the payment to them of a rental subsidy. The JAB had recommended that a phased-out rental subsidy be "reinstated in full through 1991, on the understanding that reimbursement to the staff will be contingent on the actual extension of the leases." The Respondent's decision, which is at issue, authorized payment of the rental subsidy in full, subject to certain conditions, "as from the time of [the staffs'] temporary regrouping in Amman [which took place effective 1 August 1991] ... up to the end of September 1991 [later changed to 31 October 1991] or the date of expiration of [their lease], whichever comes first." The Applicants seek full implementation of the JAB recommendation and 100% reinstatement of the subsidy "through 1991 or the date of expiration of their lease

in Baghdad," effective from 1 April 1990. On that date, the original phasing-out process began with a 25% reduction in the subsidy, followed by a 50% reduction, effective 1 July 1990 and by a 75% reduction, effective 1 October 1990. The phase-out was scheduled to be completed at the end of June 1991.

II. The Applicants also ask that the Tribunal ensure that they benefit from certain compensation and financial arrangements offered in connection with the temporary regrouping of ESCWA staff in Amman. However, this request was not before the JAB and there has been no consent to a direct appeal. Under Article 7 of its Statute, the Tribunal is not authorized to consider such requests.

III. Because the legal issue in all of the cases is identical and since both the Applicants and the Respondent wish that they be disposed of by the Tribunal in a single Judgement, the Tribunal will join the 81 cases.

IV. It is common ground between the parties that the rental subsidy was an ad hoc temporary measure which the Respondent was entitled to discontinue in the reasonable exercise of his discretion. The Applicants' contention, which was concurred in by the JAB, is that the timing of the phase-out of the subsidy was unreasonable and therefore an abuse of discretion. The Respondent contends that his action was proper.

V. The Tribunal notes that, when it was first initiated, at the time of the relocation of ESCWA from Beirut, Lebanon, to Baghdad, Iraq, in 1982, the purpose of the rental subsidy was to induce approximately 115 General Service staff members, who had been locally recruited in Beirut, to transfer to Baghdad. At the time, ESCWA anticipated difficulties in recruiting locally in Baghdad a sufficient number of qualified General Service staff members. Hence, the General Service staff members who agreed to transfer

from Beirut to Baghdad were accorded international recruited status, and, were granted, inter alia, the exceptional ad hoc rent subsidy. The latter was deemed necessary because of the high level of rents in Baghdad. Available rental housing there was apparently limited and rents were high. The transferred staff members were to live, temporarily, in housing leased by ESCWA from the Government of Iraq under a Master Lease providing for agreed rentals. This was expected to continue until completion, within the next year or two, of residential housing that the Government of Iraq had promised to build and make available to the UN rent-free or at nominal rents.

VI. To spare the transferred General Service staff members from having to devote a disproportionately high percentage of their remuneration to rent payments, rental paid by them above a specified percentage of their remuneration was to be subsidized by ESCWA, provided that their total rent did not exceed the highest rent payable in the Government-provided buildings.

VII. Before the relocation to Baghdad, it was recognized by all concerned that payment of a rental subsidy to staff in the General Service category was not permitted under the staff rules and was contrary to the general practice of organizations within the common system. Indeed, where rental subsidies had been granted exceptionally in other locations, their duration did not generally exceed five years.

VIII. By the end of the 1982-83 Biennium, the new apartment construction promised by the Government of Iraq had not been completed, as originally contemplated and it was unclear when, if ever, apartments would be provided. By 1986, as a result of the on-going Iran-Iraq war, the General Service staff members transferred from Beirut were, for security considerations, dispersed from the Government-leased apartment buildings they had previously occupied. They found other rental accommodations away

from central Baghdad. This required an upward adjustment in the amount of the rent subsidy. In February 1989, the Government of Iraq informed ESCWA that it was unable to provide the residential buildings originally envisaged.

IX. Until then, the Respondent had proposed annually to the ACABQ that the rental subsidy be continued, in the hope that the permanent residential complex would be completed by the Government of Iraq. The ACABQ had been told during those years that the funding for the subsidy could be met from additional savings and that ESCWA wished to continue the subsidy; the ACABQ agreed to this. However, after the February 1989 notification from the Government of Iraq, the Respondent proposed a phase-out of the subsidy, notwithstanding that the housing situation in Baghdad had not been stabilized by the Government of Iraq making permanent residential buildings available, as originally anticipated. The ACABQ concurred and the staff was officially notified on 1 June 1990, of the phase-out programme described above. The gradual reductions in subsidy during the phase-out were aimed at avoiding the adverse financial impact on the staff members of a sudden discontinuance.

X. Although it clearly appears that financial considerations due to the difficulties then being experienced by the Organization were also involved, the Respondent, in justifying his phase-out of the subsidy by 30 June 1991, emphasized that the subsidy was ad hoc and exceptional in nature, was always intended to be only temporary, was creating serious morale problems among locally recruited staff and was inconsistent with the accepted practice throughout the common system. In addition, the ACABQ had expressed the view that the subsidy should be phased-out.

XI. Not long after the first stage of the phase-out, there was an outbreak of hostilities, because of Iraq's invasion of Kuwait. This led, in August 1990, to a temporary repatriation from Baghdad

of internationally recruited General Service staff members. In the Fall of 1990, it was still thought that, at a later date, ESCWA would return to Baghdad. Accordingly, by a letter dated 11 October 1990, the Assistant Secretary General, OHRM, encouraged the international General Service staff members to renew or extend their rental arrangements in Baghdad for six months or, if possible, a year, in order that their personal possessions might be safeguarded. Although this indicates ESCWA's recognition that a lease of one year was reasonable, there was no suggestion at that time that the phase-out of the rental subsidy was being altered in any way. Eventually, in August 1991, ESCWA directed its Baghdad staff to regroup temporarily in Amman, Jordan. ESCWA also decided that 100% of the subsidy would be restored for the period from 1 August 1991 through 31 October 1991, except for leases that expired earlier or those that were entered into after 1 July 1991.

XII. It thus appears that the rental subsidy claim of the international General Service staff members, who transferred to Amman while still subject to rental payments in Baghdad, is limited to the months of July, November and December 1991, for which no subsidy was paid, (the intervening months having been fully subsidized, as described above) and/or to 25% of the subsidy with respect to April-June 1990, 50% of the subsidy with respect to July-September 1990, and 75% of the subsidy for the period 1 October 1990-30 June 1991. Those who did not transfer, if any, may be asserting claims for a portion of these periods.

XIII. With respect to the April-June 1990 period, the Applicants were not officially notified until 1 June 1990, of the initial 25% phase-out reduction. By an information circular dated 12 April 1990, however,the Applicants were alerted that a phase-out programme, slightly different in nature, was under consideration. Whatever may be said of the proper scope of the Respondent's discretion in dealing with the rental subsidy in the circumstances of this case, the Tribunal finds that a reduction in remuneration

of the sort involved here may not properly be made retroactive. Yet, that is plainly the consequence of the notification on 1 June 1990, that a payment relating to services rendered during April and May, was being reduced by 25%. Indeed, unless it had been made clear to the staff at the outset that an important element of remuneration, even though ad hoc and exceptional, might be withdrawn or reduced without notice - and that was not made clear here - basic principles of fairness are applicable. These call for a reasonable period of advance notice before a programme of reduction in the rental subsidy is made effective. The Tribunal finds that, in fairness, such a period of notice is necessary in order to afford each staff member receiving a subsidy, at least some opportunity to discuss the possibility of a rental adjustment with their landlord and to look into the possibility of alternative living arrangements. Also, such a period is required to allow the staff member to decide whether to separate or remain in the service of the Organization at a reduced remuneration. Accordingly, under the circumstances here, the Tribunal holds that, in view of the 12 April 1990 communication, the earliest date that the phase-out scheduled by the Respondent could lawfully be made effective, was 1 June 1990.

XIV. On the question whether the Respondent could, with effect from 1 June 1990, lawfully implement the phase-out programme, the Tribunal concludes that, with respect to internationally recruited General Service staff members who entered into leases, lease extensions or other rental arrangements after 12 April 1990, the date of the notice referred to above, the phase-out programme was within the reasonable scope of the Respondent's discretion. Just as it was within the Respondent's discretion to institute the subsidy as a means of inducing General Service staff members to transfer to and remain in Baghdad, it was equally within the Respondent's discretion to conclude that the needs which warranted the subsidy programme had been overridden by other factors or had lessened materially, if not vanished altogether. Along with this,

the Tribunal finds that, from its outset, no one could have considered the rent subsidy as anything other than a temporary measure, terminable in a reasonable fashion.

Although the conditions in Baghdad that led to the introduction of the rent subsidy had not changed, that factor alone is not decisive. If that were the litmus test, it could logically be maintained that a permanent rent subsidy would be warranted, if conditions in Baghdad remained unchanged, but, as noted, a permanent subsidy was never intended. Valid reasons for the exercise of discretion found to be permissible here have been advanced by the Respondent, i.e., growing concerns about morale problems and departure from common system practices, together with the financial implications of the subsidy at a time of budgetary difficulty. These factors amply justify a discontinuance of the subsidy in a reasonable manner. Accordingly, staff members who were on notice that a phase-out programme was under consideration when they agreed to leases, lease extensions or other rental arrangements, did so at their own risk. As to them, the 25% subsidy reduction was applicable on 1 June 1990, as were the remaining 25% reductions on 1 July 1990, until 30 September 1990, 1 October 1990, until 30 June 1991, and 1 July 1991, when a 100% phase-out had been reached.

XV. The situation may be different, however, with respect to those staff members subject to the phase-out who, prior to 12 April 1990, acted reasonably and in good faith when they entered into leases, lease-extensions or other rental arrangements. If these were of reasonable duration - which the Tribunal finds, on the basis of the Administration's 11 October 1990 communication referred to above, to be not more than one year - the staff members are entitled to the benefit of the rent subsidy programme in effect prior to the 1 June 1990 announcement, provided that there was no lawful means of reducing their rent liability. The Tribunal holds that it would be an abuse of discretion for the Respondent to refuse to continue to maintain the rent subsidy programme in effect

at the time such agreements were made. The subsidy ought to be paid until the expiration of the agreement, but not later than one year from the date it was entered into. Following the 1 June 1990 announcement, staff members who had entered into leases, lease extensions or other rental arrangements, before 12 April 1990, were obliged to act reasonably to reduce, to the extent possible, further liability thereunder if they were in a position to do so. However, the Tribunal has been unable to ascertain from the Respondent's answer to questions put by the Tribunal, whether this possibility existed. Unless the Administration can establish, through clear and convincing evidence, that such a possibility existed and could, as a practical matter, have been utilized, such staff members must be deemed to have been unable to reduce their liability.

XVI. The Respondent's discretion, as the Tribunal has held on numerous occasions, is not unlimited. It is not so sweeping as to permit disregard of the plight of a staff member who, in relying in good faith on the subsidy promised by the Respondent, has been placed in a position of liability under an agreement of reasonable duration to a third party which the staff member has no practical means of avoiding. Here, admittedly, the staff could not expect the rent subsidy to remain in effect permanently. But neither could a staff member have expected to be deprived of it - even partially - with respect to a rental agreement to which he or she was bound before having any inkling that the subsidy was to be phased out. As in the case of retroactive reductions in the subsidy, basic principles of fairness would be offended by such a result. Accordingly, the Applicants found to be eligible for a rent subsidy payment pursuant to the preceding paragraph, should receive it as indicated above.

XVII. The Tribunal notes the intimation that the Respondent's decision here was justified because of the position of the ACABQ, acting on behalf of the General Assembly. The Tribunal does not

consider an ACABQ recommendation, in itself, to be binding upon rights and obligations between the Respondent and staff members. Those rights and obligations are governed by the legal relationship between the Respondent and staff members, but not by the important relationship between the Respondent and the ACABQ.

XVIII. In view of the foregoing, the Tribunal orders that:

1. The Respondent rescind the decision dated 10 September 1991, to the extent that

(a) 25% rental subsidy payment with respect to 1 April 1990-30 May 1990, has been denied to Applicants who would be entitled to receive it, pursuant to paragraph XIII above; and pay such 25% rent subsidy to such Applicants;

(b) 25%, 50% or 75% rental subsidy payment, as appropriate, with respect to the 1 June 1990 - 11 April 1991 period, has been denied to Applicants found to be entitled to receive all or part of such rental subsidy, pursuant to paragraphs XV and XVI above; and pay all or part of such rental subsidy, as may be due, to such Applicants.

2. All other pleas are rejected.

(Signatures)

Jerome ACKERMAN
President

Samar SEN
Vice-President

Mikuin Leliel BALANDA
Member

Genera, 25 June 1993

R. Maria VICIEN-MILBURN
Executive Secretary